95-1705

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Petitioner,

VS.

JOHN D. ROTH, JR.,
Respondent.

On Petition for a Writ of Certiorari to the
Missouri Court of Appeals for the Western District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does a state court that modifies its verdict form to comply with the FELA violate any constitutional rights of the parties?

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JURISDICTION

Petitioner seeks to invoke jurisdiction under 28 U.S.C. § 1257(a). Respondent objects to jurisdiction under this statute. The verdict form that Petitioner challenges is not a "statute" of Missouri and hence no jurisdiction is afforded under 28 U.S.C. § 1257(a). The Missouri Approved Instructions, which contain the verdict form at issue, are used pursuant to an April 9, 1991 order of the Missouri Supreme Court. (See A.1) Furthermore, the "validity" of the FELA is not drawn into question and, as such, the provisions of 28 U.S.C. § 1257(a) do not authorize the jurisdiction of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. § 1257(a)

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

45 U.S.C. § 53

> The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S CONSTITUTIONAL ARGUMENT WAS WAIVED.

Petitioner maintains that the trial court's instructions and verdict form violate the equal protection, due process and supremacy clauses of the United States Constitution. At trial, however, Santa Fe made no specific constitutional challenge to the instructions and verdict form. The failure to set forth facts demonstrating a violation of a specific constitutional provision bars a party from raising a constitutional challenge on appeal. *Gilliam v. Chicago & NorthWestern Transp. Co.*, 859 S.W. 2d 155, 162 (Mo. App. 1993). In *State ex rel. Spralding v. Borduarnt*, 501 S.W.2d 527, 530 (Mo. App. 1973), the Missouri Supreme Court held:

> [I]t is not sufficient that certain sections of the Constitution be set out and the assertion made that rights thereunder have been violated but the facts which constituted such violation must be set out.

Santa Fe failed to properly raise a constitutional issue to the trial court. A mere allegation that an instruction is unconstitutional is insufficient to preserve the issue for review. In *Gilliam*, supra, at page 162, the court stated:

> [T]he challenge did not meet the requirement that the facts which constituted a violation of C&NW's constitutional rights be set out. All that was stated was the bare conclusion that the failure to require the jury to state the percentage of fault which it assessed against Gilliam on the verdict form violated its constitutional rights. There was no attempt to state facts which demonstrated how this failure deprived C&NW of due process of law. C&NW has failed to properly raise a constitutional question, and therefore, no

issue is presented for review on that question. *Callier v. Director of Revenue*, 780 S.W.2d 639, 641[3] (Mo. banc 1989).

Petitioner made only the request that the trial court declare the present MAI scheme to be unconstitutional. Petitioner made no reference to either the Missouri or U.S. Constitution. In fact, Santa Fe's attorneys never uttered the phrases equal protection, due process, or supremacy clause. Furthermore, Santa Fe's attorneys made no factual argument to support its "unconstitutional" argument. Therefore, this Court should not consider Petitioner's argument as it has not been properly raised.

II.

THE FORM OF INSTRUCTIONS AND VERDICTS IN AN FELA CASE ARE PROCEDURAL MATTERS GOVERNED BY STATE LAW.

This Court has established that the measure of damages in an FELA case is an issue of "substance" determined by federal law. *St. Louis Southwestern Railway Company v. Dickerson*, 470 U.S. 410, 411 (1985). As such, it has been held that the question whether a present value instruction should be given is a federal question. *Id.* at 411. Likewise, this Court has also determined that the question whether a present value instruction in an FELA case must be given is a matter governed by federal law. *Norfolk & Western Railway Company v. Liepelt*, 444 U.S. 490, 493 (1980).

However, matters as to the form of instructions and verdicts are procedural matters that are governed by state law. The Petitioner relies upon Justice Frankfurter's opinion in *Dice v. Akron, Canton, & Youngstown R. Co.*, 342 U.S. 359, 364-365 (1952) cited in its Petition. That opinion, however, provides that a state court hearing an FELA case is free to use its own "form in which the law is administered." *Id.* at 365. Furthermore,

Mondou v. New York, New Haven & Hartford RR. Co., 223 U.S. 1 (1912), another case cited by Petitioner, demonstrates that Congress, in enacting the FELA, did not attempt to "control or affect" state court "modes of procedure." *Id.* at 57. It is certain, therefore, that the form of instructions and verdicts are procedural and governed by state law.

It must be noted that Petitioner admits that the appropriate federal law required under FELA was given to the jury in the instructions and verdict form submitted by the trial court. Petitioner was entitled to and received a contributory negligence instruction. Also, the jury was instructed that its award "must be determined by diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff." (A.2-3) As such, Petitioner acknowledges that the *correct* substantive federal law was submitted to the jury!

Petitioner argues that the trial court's instructions and verdict form denied it meaningful appellate review. However, Petitioner has no federal right to appellate review of a damage award in an FELA case. Creation of such a federal right would wreck havoc on every state's jury instructions. For example, Missouri, like many other states, does not itemize damages on its verdict forms. Petitioner has no federal right to review, for appeal, each specific element of the jury's damage award such as past wage loss, future wage loss, past pain and suffering, future pain and suffering and all other elements of damages. To adopt Petitioner's argument would essentially require use of federally mandated jury instructions in an FELA case. The FELA and past decisions of this Court clearly do not require use of specific instructions.

Petitioner also argues that it is impossible to determine whether the jury's verdct in this case may have been $76 million with 99% fault attributable to the plaintiff. This argument represents nothing more than wild speculation. The jury awarded damages of $760,000 based on the two back injuries the plaintiff sustained

on May 2, 1990 and May 8, 1990. As a result of these injuries and the back surgery that followed, plaintiff was not physically capable of returning to his railroad employment. At trial plaintiff called John Orson Ward, Chairman of the Department of Economics of the University of Missouri, as an expert witness. Dr. Ward testified that the plaintiff's economic wage loss for past and future earnings was $747,012 after reducing future earnings to present cash value and using after tax figures. As such, plaintiff's damage award was very close to the total economic loss.

III.

MISSOURI'S FELA VERDICT FORM IS MODIFIED FROM THE STATE NEGLIGENCE VERDICT FORM TO COMPLY WITH THE FELA, NOT DISCRIMINATE AGAINST FELA LITIGANTS.

Missouri Approved Instruction 8.02, entitled "Damages — F.E.L.A. — to Employee" is given in FELA cases where contributory negligence is submitted. MAI 8.02 provides:

> If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the occurrence mentioned in the evidence. Any award of future pecuniary damages must be included at present value. Any award you make is not subject to income tax.
>
> If you find plaintiff contributorily negligent as submitted in Instruction Number _____, then your award must be determined by diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff.

This instruction was given by the trial court in this case (A.2-3). The Committee Comment to MAI 8.02 explains the basis for its departure from Missouri's general negligence verdict form. The Comment states:

> The submission of comparative fault in an F.E.L.A. case differs from the method in Chapter 37.00 for use in cases based on Missouri law. F.E.L.A. cases are governed by federal law. Under 45 U.S.C. § 53, the jury diminishes damages in proportion to the employee's negligence. Under Chapter 37.00, the jury determines total damages and plaintiff's percentage of fault but the judge makes the actual computation diminishing total damages to the amount recoverable by plaintiff.

The distinction is further articulated by Missouri Appellate decisions. For example, in *Gilliam v. Chicago & NorthWestern Transportation Co.*, 859 S.W. 2d at 155, 161-162 (Mo. App. 1993), the court stated:

> C & NW next contends the court erred in giving Gilliam's verdict form because the form failed to require the jury to find a specific percentage of fault on the part of Gilliam. C & NW contends that the instructions based on comparative fault should have been given rather than instructions based on FELA. The form about which C & NW complains is MAI 8.02. The committee comment following that instruction states that the submission of comparative fault in a FELA case differs from the submission of comparative fault in cases based on Missouri law. The committee points out that under 45 U.S.C. § 53, the jury diminishes damage in proportion to the employee's negligence. On the other hand, in comparative fault under Missouri law, the jury determines total damages and the plaintiff's percentage of fault but the judge diminishes the total damages by the percentage of fault found on the part of the plaintiff. Here, the verdict form was in compliance with MAI 8.02.

Therefore, Missouri's verdict form is modified only to comply with 45 U.S.C. § 53 which provides that the jury, not the judge, reduces the damages by the percentage of fault attributable to the plaintiff. The verdict form is not intended to discriminate against FELA litigants.

CONCLUSION

Respondent prays that the Court deny the Petition for a Writ of Certiorori.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI

en banc

April 9, 1991

ORDER

The forms of Jury Instructions, Notes on Use, and Committee's Comments, as finally submitted to the Court by the Committee on Jury Instructions as set forth on pages 1 through 647 of the attached volume entitled Missouri Approved Jury Instructions, [MAI], Fourth Edition, published by West Publishing Company, St. Paul, Minnesota, copyright 1991, are approved and hereby adopted by the Court.

The aforesaid forms must be used on and after January 1, 1992, and may be used prior without such use being presumed to be error.

Those Instructions, Notes on Use, and Committee's Comments that are designated as "Committee Proposed" are neither approved nor disapproved by the Court, and neither the use of nor the failure to use these instructions shall be presumed to be error.

Day — to — Day

Charles B. Blackmar
Chief Justice

INSTRUCTION NO. 10

If you find in favor of plaintiff on his claim of injury on May 2, 1990, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the accident of May 2, 1990. Any award of future pecuniary damages must be included at present value. Any award you make is not subject to income tax.

If you find plaintiff contributorily negligent as submitted in Instruction No. 9, then your award must be determined by diminishing total damages in proportion to the amount of negligence attributable to plaintiff.

MAI 8.02 [1991 Revision]; MAI 32.07 [1978 Revision] — Notes on Use (1978 Revision), Note 2

First, second and fourth sentences submitted by plaintiff; third sentence submitted by defendant The Atchison, Topeka and Santa Fe Railway Company

INSTRUCTION NO. 14

If you find in favor of plaintiff on his claim of injury on May 2, 1990, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the accident of May 2, 1990. Any award of future pecuniary damages must be included at present value. Any award you make is not subject to income tax.

If you find plaintiff contributorily negligent as submitted in Instruction No. 13, then your award must be determined by diminishing total damages in proportion to the amount of negligence attributable to plaintiff.

MAI 8.02 [1991 Revision]; MAI 32.07 [1978 Revision] — Notes on Use (1978 Revision), Note 2

First, second and fourth sentences submitted by plaintiff; third sentence submitted by defendant The Atchison, Topeka and Santa Fe Railway Company